

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARSENIO RUSSHON MORGAN,
Plaintiff,
v.
MICHAEL BROWN, et al.,
Defendants.

No. 2:20-cv-1433-EFB P

ORDER

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, seeks leave to proceed in forma pauperis. ECF No. 2.

Application to Proceed In Forma Pauperis

Plaintiff's application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

Screening Requirements

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

1 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”
 2 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th
 3 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
 4 meritless legal theories or whose factual contentions are clearly baseless.” *Jackson v. Arizona*,
 5 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute*
 6 *on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490
 7 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,
 8 has an arguable legal and factual basis. *Id.*

9 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
 10 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
 11 what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S.
 12 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).
 13 However, in order to survive dismissal for failure to state a claim, a complaint must contain more
 14 than “a formulaic recitation of the elements of a cause of action;” it must contain factual
 15 allegations sufficient “to raise a right to relief above the speculative level.” *Id.* (citations
 16 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that
 17 merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (alteration in original)
 18 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d
 19 ed. 2004)).

20 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
 21 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
 22 *Corp.*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content
 23 that allows the court to draw the reasonable inference that the defendant is liable for the
 24 misconduct alleged.” *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint
 25 under this standard, the court must accept as true the allegations of the complaint in question,
 26 *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), as well as construe the pleading
 27 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, *Jenkins v.*
 28 *McKeithen*, 395 U.S. 411, 421 (1969).

Screening Order

Plaintiff's complaint (ECF No. 1) includes the following allegations: On November 21, 2018, Dr. Michael Brown of the Sonoma Valley Hospital performed surgery on plaintiff's right knee. *Id.* at 3. Prior to the surgery, Dr. Brown noted the presence of a "metallic fragment" that was "just anterior to the distal femur," and could "conceivably . . . lead to pain." *Id.* Plaintiff, who now lives in "constant pain," alleges that it was "professional negligence to deliberately engage [in] surgery without removing the metallic fragment" *Id.* Plaintiff claims that despite physical therapy and medication, his pain is not going away. *Id.* at 5. He alleges that his primary care provider at California State Prison, Solano, Dr. Jaime Cortes, has subjected him to cruel and unusual punishment by failing to order the removal of the metal. *Id.* Plaintiff asserts Eighth Amendment claims of deliberate indifference to medical needs against Drs. Brown and Cortes. As discussed below, the allegations are not sufficient to survive screening.

"Prison officials are indifferent to prisoners' serious medical needs when they deny, delay, or intentionally interfere with medical treatment." *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992). To establish deliberate indifference with respect to a physician's treatment decision, a plaintiff must allege that "the course of treatment the doctors chose was medically unacceptable under the circumstances, and the plaintiff must show that they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations and quotation marks omitted). Mere differences of medical opinion are insufficient to establish deliberate indifference. *See Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) ("At most, Sanchez has raised a difference of medical opinion regarding his treatment. A difference of opinion does not amount to a deliberate indifference to Sanchez' serious medical needs.").

Here, the allegations demonstrate nothing further than a difference of opinion between plaintiff and his medical providers. Plaintiff alleges that Dr. Brown viewed the metallic fragment as "conceivably" leading to pain. There are no allegations suggesting that proceeding with the surgery was medically unacceptable under those circumstances or posed an excessive risk to plaintiff's health. Similarly, plaintiff's allegations against Dr. Cortes demonstrate nothing more

1 than a difference of opinion as to whether plaintiff needed surgery to remove the metallic
2 fragment. There are no allegations suggesting that Dr. Cortes acted with a culpable state of mind.
3 *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).
4 The required indifference for an Eighth Amendment claim must be substantial; mere malpractice,
5 or even gross negligence, does not constitute cruel and unusual punishment. *Estelle*, 429 U.S. at
6 106.

7 Leave to Amend

8 Plaintiff's complaint is dismissed with leave to amend. If plaintiff chooses to file an
9 amended complaint it should observe the following:

10 Any amended complaint must identify as a defendant only persons who personally
11 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
12 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
13 constitutional right if he does an act, participates in another's act or omits to perform an act he is
14 legally required to do that causes the alleged deprivation). The complaint should also describe,
15 in sufficient detail, how each defendant personally violated or participated in the violation of his
16 rights. The court will not infer the existence of allegations that have not been explicitly set forth
17 in the amended complaint.

18 The amended complaint must contain a caption including the names of all defendants.
19 Fed. R. Civ. P. 10(a).

20 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See
21 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

22 Any amended complaint must be written or typed so that it so that it is complete in itself
23 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
24 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
25 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
26 F.3d 1467, 1474 (9th Cir. 1997) (the "'amended complaint supersedes the original, the latter
27 being treated thereafter as non-existent.'" (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
28 1967)).


1 Finally, the court notes that any amended complaint should be as concise as possible in
2 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of
3 procedural or factual background which has no bearing on his legal claims.

4 Conclusion

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. Plaintiff's application to proceed in forma pauperis (ECF No. 2) is GRANTED;
7 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
8 in accordance with the notice to the California Department of Corrections and
9 Rehabilitation filed concurrently herewith;
10 3. Plaintiff's complaint is dismissed with leave to amend within 30 days from the
11 date of service of this order; and
12 4. Failure to comply with this order may result in dismissal of this action for the
13 reasons stated herein.

14 DATED: September 29, 2020.

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16 EDMUND F. BRENNAN
17 UNITED STATES MAGISTRATE JUDGE
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